STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 2, 1999
v	No. 211215 Roscommon Circuit Court
ADAM KEITH CORNELL, Defendant-Appellant.	LC No. 96-003174 FH

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

JANSEN, J. (dissenting).

I respectfully dissent with respect to the instructional issue. I would hold that the trial court abused its discretion in denying defendant's request to give the jury an instruction on the lesser misdemeanor offense of breaking and entering without permission.

Defendant was charged with arson of a building and breaking and entering a building with intent to commit larceny. With respect to the breaking an entering charge, the trial court denied defendant's requested instruction on the misdemeanor offense of breaking and entering without permission, essentially believing that this was an "all-or-nothing" case. In other words, the trial court believed that it was defendant's position that he did not have the intent to commit a larceny, therefore, there was either a breaking and entering with intent to commit a larceny or there was no crime committed at all.

The trial court's ruling is not consistent with the rule enunciated in *People v Stephens*, 416 Mich 252, 263; 330 NW2d 675 (1982), where our Supreme Court held that the requested misdemeanor instruction must be supported by a rational view of the evidence adduced at trial. The Court explained that this means that proof of the element or elements differentiating the two offenses must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense. *Id.* at 263. Additionally, the lesser included offense instruction is only proper where the greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser offense. *Id.*

In the present case, the disputed element for the jury was whether defendant had the intent to commit a larceny when he broke into the house. There was evidence to support defendant's theory. In

the first statement that he gave to the police, defendant stated that Cary Prescott told him and Christopher Cornell that Prescott wanted to show them a place where he had outrun a police dog. When they arrived at the house, Prescott started punching out windows and started a fire in the house. Defendant stated that neither he nor Cornell did anything to the house. Further, Prescott testified at trial that it was Cornell's idea to break into the house and that they had not intended to steal anything. Both of defendant's police statements, Prescott's testimony, and Cornell's testimony all presented different versions of what happened. Thus, the jury was confronted with several different versions and had to decide which was the most credible. Indeed, for the jury to acquit defendant of arson, as it did, it had to minimally believe Prescott's version that he attempted unsuccessfully to set the house on fire and that he did not see defendant or Cornell set anything on fire.

Not only was there evidence supporting defendant's theory that he had no intent to commit larceny, but also the only disputed factual element was whether defendant had an intent to commit larceny, which is an element not included in the lesser misdemeanor offense. In other words, the lesser misdemeanor instruction was proper in this case because the greater offense required the jury to find that the disputed factual element, whether defendant had the intent to commit larceny, existed and this element is not required for a conviction of breaking and entering without permission. See also *People v Acosta*, 143 Mich App 95, 103; 371 NW2d 484 (1985). Therefore, the trial court abused its discretion in denying defendant's requested instruction of the lesser misdemeanor offense of breaking and entering without permission.

Further, the requested instruction would not have resulted in undue confusion or some other injustice. *Stephens, supra* at 264. Because there was testimony supporting defendant's theory of lack of intent to commit a larceny, the trial court should not have deprived the jury of its factfinding role. I would reverse defendant's conviction and remand for a new trial on this basis.

/s/ Kathleen Jansen